1993

State of Utah v. Son T. Nguyen : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS,

STATE OF UTAH

BLUE 2

STATE OF UTAH, Plaintiff and Respondent, vs. SON T. NGUYEN, Defendant and Appellant.	Case No. 930156-CA Criminal No. 921400546 Priority No. 2

APPELLANT'S BRIEF

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH

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IN THE COURT OF APPEALS,

STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff and Respondent,	)	
vs.	)	
	)	
SON T. NGUYEN,	)	Case No. 930156-CA
	)	
	)	Criminal No. 921400546
Defendant and Appellant.	)	Priority No. 2

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	)	
	)	
Defendant and Appellant.	)	Priority No. 2

JURISDICTION OF THE COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated 78-2a-3(2)(f) (1990 as Amended).

ISSUES PRESENTED FOR REVIEW

The Defendant contends that the trial court erred in allowing the introduction of evidence of an unrelated theft that occurred in Price, Utah to which the Defendant could not be associated.

In deciding the issue on appeal, the standard of review is well settled. Admission of evidence under Rule 404(b) is a question of law and is reviewed by the appellate court for correctness. The trial court's underlying factual determination should be given deference by the appellate court and should only be overruled when they are clearly erroneous. State v. O'Neil, 206 Utah Adv. Rep. 14, 848 P.2d 694 (Utah App.1993).

The second issue raised in this matter is whether the trial

court erred in finding that the law enforcement personnel had a "reasonable suspicion" to make the stop of the Defendant's vehicle. The trial court's determination of the existence of a reasonable suspicion should not be overturned unless it is clearly erroneous. State v. Sykes, 198 Utah Adv. Rep. 35 (Utah App. 1992).

The third issue on appeal is whether the trial court erred in denying the Defendant's Motion to Suppress the evidence obtained from the search of the vehicle because the Defendant was unreasonably detained. The appellate court, in reviewing a trial court's denial of a motion to suppress, reviews the trial court's findings of fact "under a 'clearly erroneous' standard" and the trial court's "ultimate legal conclusions" based on those findings "under a 'correctness' standard." State v. Lopez, 831 P.2d 1040, 1043 (Utah App. 1992).

The fourth issue is whether the trial court erred in denying the Defendant's Motion to Suppress the evidence obtained from the warrantless search of the vehicle. The appellate court, reviews the trial court's action in accordance with the standard set out in the paragraph discussing issue number three above.

The fifth issue is whether the trial court erred in admitting evidence of the Defendant's confession without establishment, by clear and independent evidence, of the corpus delicti of the crime. The appellate court reviews the findings of the trial court giving deference to the trial court's factual findings. State v. Weldon, 314 P.2d 353 (Utah 1957).

CONTROLLING STATUTORY PROVISION

There are no controlling statutory provisions that affect the

disposition of this case other than the Utah Rules of Evidence and case law cited hereinafter.

STATEMENT OF THE CASE

The Defendant, Son T. Nguyen, was charged with Receiving Stolen Property, a Second Degree Felony, in violation of Utah Code Annotated 76-6-408 (1953 as Amended), in that the Defendant allegedly, on or about October 27, 1992, in Utah County, Utah received, retained or disposed of another's property knowing that it had been stolen, or believing that it probably had been stolen, with a purpose to deprive the owner thereof, said property having a value in excess of $1,000.00.

The Defendant was convicted by the trial court, sitting without a jury of the crime but the court found that the value of the property attributed to the Defendant had a value in excess of $250.00 but less than $1,000.00, a Third Degree Felony.

The Appellant appeals his conviction herein.

PROCEDURAL CHRONOLOGY OF THE CASE

1. The Information was filed in this matter on November 18, 1992 (R. 1).

2. A Preliminary hearing was held on November 17, 1992 and as a result thereof, the Defendant was bound over to District Court (R. 8-9).

3. The Defendant entered a Not Guilty plea to the charge at his Arraignment which took place on December 9, 1992 (R. 13).

4. Counsel for the Defendant filed various motions before trial. Specifically, Defendant, through counsel, filed a Motion in

Limine to Suppress Evidence Obtained Without a Search Warrant with supporting memorandum (R. 14-19), a Motion in Limine to exclude evidence of unrelated or suspected crimes (R. 21-22), and a Supplemental Memorandum, in support of Defendant's Motion to Suppress (R. 24-69).

5. The State filed a Trial Brief addressing the issues raised by the Defendant's motions (R. 72-91).

6. The case came on for trial on January 20, 1993, before the Honorable Guy R. Burmingham, sitting without a jury (R. 93-98).

7. The trial court, at the end of the case, found the Defendant guilty of the crime charged but found that the property in question that could be attributed to the Defendant, had a value greater than $250.00, but less than $1,000.00 and accordingly convicted the Defendant of a Third Degree Felony (R. 94).

8. The trial court entered written Findings of Fact, Conclusions of Law and an Order relating to motions filed by the Defendant, denying the same on February 16, 1993 (R. 107-114).

9. The court set February 24, 1993, as the time for pronouncement of Judgment and Sentence. At that time the Defendant was sentenced to the Utah State Prison for an indeterminate term of not more than five years, was ordered to pay a fine of $1,000.00, a surcharge of $850.00, and restitution of $1,003.75 (which obligation was to be joint and several with the other co-defendants). Execution of the sentence was suspended and the Defendant was placed on supervised probation for a period of 36 months and ordered to obey the terms of the Probation established

by the trial court and Adult Probation and Parole (R. 124-25).

10. The Defendant, through counsel, served and filed a Notice of Appeal on March 16, 1993 (R. 127).

STATEMENT OF FACTS

A. Facts Relating to the Theft From 7-11 in Price Utah on October 10 or 11, 1992.

1. The prosecution's witness, Louise Roybal testified that she was a clerk at a 7-11 Store located in Price, Utah (Tr. 7, L. 19 to 8, L. 7). While working the graveyard shift on October 10, 1992, she observed seven Oriental individuals playing the four or five video games located in the store (Tr. 8, L. 19 to 9, L. 13). The individuals bought approximately $50.00 worth of merchandise. The clerk testified that the Oriental individuals did not leave the store together, but in pairs (Tr. 9, L. 23 to 10, L. 11). Louise, while cleaning around the machines the next morning, noticed no damage of any kind to the machines (Tr. 18, L. 10-19).

2. Barbara Jean Robinette testified that she was the manager of the 7-11 Store in Price as of October 10, 1992. As the result of a phone call from her assistant on the morning of October 11, 1992, she went to the store and discovered that one of the coin operated video games was not working. On October 12, 1992, one day later, Ms. Robinette discovered that the lock had been cut, a circuit board taken from the machine and the coin box emptied (Tr. 12, L.14 to 16, Line 18).

3. Officer Tracy Lynn Allred of the Price City Police Department testified that he went to the 7-11 Store as a result of

a call on October 12, 1992 at 9:37 a.m. and verified that one of the video machines had a lock cut, the coin box emptied and the circuit board removed. The officer also noted pry marks on the machine (Tr. 19, L. 13 to 24, L. 16).

B. Facts Relating to the Incident at the Skyview Cafe in Spanish Fork Canyon on October 27, 1992.

4. Maxine Barker testified that she was the owner and manager of Skyview Cafe located in Spanish Fork Canyon (Tr. 25. L.22 to 26, L. 6). Ms. Barker testified that on October 27, 1992, a cream colored foreign car pulled up, containing four Oriental individuals. One of the occupants left the car and entered the cafe offering to sell up to two or three hundred rolls of quarters. Ms. Barker agreed to buy two rolls (twenty dollars). The individual returned to the store with two rolls of quarters rolled in paper from a yellow legal pad and the transaction was concluded. Ms. Barker had an employee go outside and write down the vehicle's license plate, which she verified. Ms. Barker then called the police and gave them the information that suspicious persons had tried to sell up to $2,000.00 of coins to her that had been wrapped in legal notebook paper (Tr. 27, L. 1 to 32, L.3).

5. Shannon Horn, a Utah County Sheriff's Office Dispatcher, testified that Rhonda, another dispatcher, had received a call and as a result, an Attempt to Locate Card was prepared (but not brought to trial) indicating that male individuals in a cream colored or tan compact car, with a designated license plate, were going down the canyon selling quarters wrapped in yellow notebook

paper. Calls were placed by other Utah County Sheriff's dispatchers to businesses in Spanish Fork Canyon and to the dispatcher in Price who indicated that thefts had occurred from video machines in the area, which information was added to the ATL (Attempt to Locate Card) (Tr. 32, L. 24 to 38, L. 10).

6. Shannon Horn also checked the license plate number and found that the car was registered to a Vietnamese person, whose license was suspended (Tr. 38, Lines 11 to 20). Ms. Horn testified that the information was accumulated prior to the stop of the vehicle Defendant was driving (Tr. 38, Line 17 to 39, L. 19).

7. Penney Turner, a dispatcher for the Department of Public Safety, State of Utah, which includes the Highway Patrol testified that she was on the day shift on October 27, 1992. Ms. Turner testified that she had received a ATL from the Utah County Sheriff's office that morning and that at approximately 10:30 a.m., dispatched an ATL on four suspicious Oriental that had left the Skyview Cafe trying to sell three to four hundred dollars worth of quarters wrapped in yellow paper. Approximately five minutes later, Ms. Turner received additional information from the Utah County Sheriff's Office that the individuals had just left the Little Acorn cafe. At the same time, Ms. Turner was advised that the individuals were suspects in vending machine burglaries out of Carbon and Emery County (Tr. 42, L. 4 to 49, L. 20). Ms. Turner testified that she was in contact with the officer making the stop and all of the information accumulated by her relating to the ATL had been dispatched to the officer before 10:45 a.m., the time of

the traffic stop of the vehicle the Defendant was driving (Tr. 50, L. 6 to L. 14).

C. Facts Relating to the Traffic Stop of the Vehicle the Defendant was Driving.

8. Mr. Dennis Shields testified that he was a trooper with the Utah Highway Patrol and was on patrol during the morning of October 27, 1992 (Tr. 55, L. 21 to 56, L. 9). Officer Shields testified that he received an ATL on a white Toyota with Utah Plates containing four Oriental individuals that was heading from the Little Acorn cafe at the mouth of Spanish Fork Canyon northbound. Further, he had been notified that the individuals had gone to the Little Acorn to sell rolls of quarters that were wrapped up in yellow paper to the owner of the Little Acorn (Tr. 57, L. 14 to 58, L. 6).

9. Officer Shields testified that another Department of Transportation unit spotted the car, a tan Toyota with the license plate that was given, northbound in the American Fork area (Tr. 58, L. 7 to L. 17). Officer Shields overtook the car himself and as he was making the traffic stop, he was informed that representatives of Price City wanted to talk to the individuals in connection with a burglary in the area (Tr. 58, L. 18 to L. 23).

10. Officer Shields identified the Defendant as the driver and immediately obtained the keys from the ignition to the car (Tr. 64, L. 10 to L. 20). Officer Shields then asked the Defendant if he had any large amount of quarters wrapped in yellow paper to which the Defendant answered, "no" (Tr.59, L. 23 to 60, L. 10).

The officer, after obtaining the Defendant's identification, required the Defendant to exit the vehicle (Tr. 60, L. 11 to L.15). The officer asked the Defendant other questions relating to where they had been and questions relating to the ownership of the car (Tr. 60, L. 20 to 61, L. 25). Minutes later, Deputy Hill, with the Utah County Sheriff's Department took the Defendant back to his vehicle (Tr. 62, L. 5 to L. 16; 65, L. 8 to L. 23).

11. Mr. David Hill testified that he was a Deputy Utah County Sheriff and was on duty on October 27, 1992. Deputy Hill received the ATL at 9:54 a.m. He testified that it is regular procedure to stop a vehicle identified in the ATL and obtain information from them, contact the agency the originated the ATL and obtain the requested information (Tr.67, L. 7 to 68, L. 18).

12. Deputy Hill received information in the form of an ATL containing similar information that was dispatched to Officer Shields (Tr. 68, L. 23 to 72, L. 20). Deputy Hill was located at Mountain Springs when he learned that the vehicle in question had been stopped by the Utah Highway Patrol. It then took Deputy Hill fifteen minutes to arrive at the location in American Fork where the Defendant's vehicle had beens stopped (Tr. 72. L. 16 to 73, L. 3).

13. Upon arriving at the scene, Deputy Hill identified the Defendant, as the driver and took him back to his vehicle. Deputy Hill told the Defendant the circumstances that gave rise to the stop and asked the Defendant basic questions relating to the ownership of the car and the owner's phone number. The Defendant

told Deputy Hill that he had no quarters in the car (Tr. 73, L. 22 to 75, L. 18). Deputy Hill was unable to testify when the search of the vehicle began in relation to the questioning of the Defendant (Tr.78, L. 25 to 79, Line 7). Later in his testimony Deputy Hill stated that after he had gotten the Defendant in his vehicle and explained the reason for the stop, he advised him of his Miranda rights from memory (Tr. 104, L. 10 to L. 19). The Defendant was asked only if he understood his rights but was not asked if he waived his rights (Tr. 104, L.21 to 105, L. 9).

14. Deputy Hill then interrogated the Defendant about the quarters, where the Defendant and the other occupants of the car had been and the identity of the owner of the car. The Defendant denied having any quarters, indicated that they had been visiting a friend in Colorado Springs and that the car was owned by his friend, "Bo", whose telephone number he did not know (Tr. 105, L. 10 to 106, L. 9).

15. As Deputy Hill was interrogating the Defendant, the search of the vehicle the Defendant was driving was conducted by other officers, including Dennis Shields (Tr. 106, Lines 7 to 13; 112, L. 6 to 114, Line 11). A duffel bag was retrieved from the car containing both unrolled and rolled quarters (totaling $2,096.75) and a pair of vice grips. A yellow legal pad of paper, bolt cutters and screwdrivers were found in other locations in the car (Tr. 106, L. 14 to 109, L. 4; 111, Lines 4 to 14).

D. <u>Facts Relating to the Confession of the Defendant.</u>

16. Mr. Scott Cater testified that he was a Deputy Utah

County Sheriff on October 27, 1992, and met with the Defendant at the American Fork police station (Tr. 122, L. 18 to 123, L. 5). Deputy Carter was told that another officer had mirandized the Defendant and only gave the Defendant a brief reminder of his rights. Again, no one asked the Defendant if he waived his rights (Tr. 123, Lines 6 to 25).

17. The Defendant indicated that he and his companions had gone on a three day trip to Colorado, had been involved in four burglaries, two in Colorado Springs and two in other unspecified locations and that some of the quarters in his possession came from those burglaries (Tr. 125, Line 22 to 127, Line 21). Two days later, on October 29, 1992, a written statement, Exhibit 11, was taken from the Defendant (Tr. 128, L. 18 to 130, L. 22). The Defendant detailed how money had been taken from the coin operated machines in 7-11 Stores in Colorado (Tr. 131, L. 5 to 134, L. 16).

SUMMARY OF ARGUMENT

The Appellant respectfully submits that the trial court erred in admitting evidence of the burglary that occurred in Price, Utah on October 10 or 11, 1992, because there is absolutely no evidence that links that theft to the Defendant or the evidence in this case.

Secondly, the trial court erred in ruling that the attempt by persons in the Defendant's car to exchange quarters for currency, without more, was sufficient for the officers involved to form a "reasonable suspicion" justifying the stop of the Defendant's car on the highway.

Third, the trial court erred in denying the Defendant's Motion to Suppress the evidence obtained from the search of the Defendant's car on the grounds that the search was without a warrant or the consent of the Defendant and the officers lacked the requisite factual basis to form the necessary suspicion to authorize the search. Additionally, the Defendant was unreasonably detained on the roadway and based thereon, the evidence from the search should have been suppressed.

Finally, the court erred in admitting evidence of the defendant's statements without clear independent proof of a crime.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THE BURGLARY IN PRICE, UTAH.

In reviewing the transcript of the hearing in this matter, the intent of the prosecution in introducing the evidence related to the alleged theft from the 7-11 Store in Price is perplexing.

The alleged theft occurred on October 10 or 11, 1992 in Price. The Defendant was stopped on October 27, 1992, sixteen days later. The theft was not discovered by the 7-11 store manager in Price until the morning of October 12, 1992. There is no evidence that the **seven** oriental individuals that were seen by the store clerk had anything to do with the theft as opposed to other patrons or employees of the store. It is unbelievable that the trial court would allow the introduction of the evidence based upon the fact that seven Oriental individuals happened to visit the site of a

burglary within forty-eight hours of it's discovery.

There was no forensic evidence that the bolt cutters, vice grips or other tools found in the vehicle driven by the Defendant had anything to do with the burglary in Price. Neither the Defendant nor the three people traveling with him could be identified by the store clerk. In sum, there is not a scintilla of evidence that the Defendant had anything to do with the Price theft. To allow evidence of other crimes without any foundation that the charged Defendant was involved is violative of the Utah Rules of Evidence and interpreting case law.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401 U.R.E. Further, Rule 404(b) of the Utah Rules of Evidence provides that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident.

Admission of evidence under Rule 404(b) is a question of law and is reviewed by the appellate court for correctness. The trial court's underlying factual determination should be given deference by the appellate court and should only be overruled when they are clearly erroneous. State v. O'Neil, 206 Utah Adv. Rep. 14, 848 P.2d 694 (Utah App.1993). In this case, the trial court made no factual findings related to the evidence except that the court overruled

the objections of the defense to it's introduction (Tr. 10, L. 25 to 11, L. 10; 14, L.24 to 15, L.3; 23, Lines 5 to 8; R. 107-112).

The fact that seven Oriental individuals were in Price, Utah within forty-eight hours of the burglary does not tend to make more likely, the assertion that the Defendant who is likewise Oriental, committed a crime, especially in light of the fact that the clerks failed to identify the Defendant. Further, none of the coins, tools or other items found in the car driven by the Defendant related to the incident in Price. Accordingly, the evidence is not relevant.

In reviewing the admission of evidence of a prior bad act, the appellate court must find first, that the prior bad act evidence is admissible under the provisions of Rule 404(b), as a matter of law. Second, the appellate court must determine as a matter of law, that the trial court acted reasonably in striking the balance between probative value and prejudice under Rule 403 of the Utah Rules of Evidence. If either of the tests are not met, the appellate court must determine if the admission of evidence resulted in prejudicial error. State v. O'Neil, supra.

Inasmuch as the evidence could not be linked to the Defendant at all, the evidence was improper under the Rule as a matter of law. Further to introduce the evidence because quarters were involved and because Oriental males were seen in the area is tantamount to racism. Video machines are vandalized on a daily basis. That fact hardly justifies the introduction of that evidence in a case involving a person charged with a similar offense when persons of his same race are seen in the area.

Obviously, it's introduction was unfairly prejudicial and inasmuch as there is no relevance, the introduction of the testimony and evidence was error.

On appeal, this Court must determine whether there is a reasonable likelihood, absent the error, of an outcome more favorable to the Defendant. Sate v. Hamilton, 827 P.2d 232, 239-40 (Utah 1992); State v. Verde, 770 P.2d 116, 120-21 (Utah 1989); State v. Cloud, 722 P.2d 750, 752 (Utah 1986).

In this case, it is respectfully submitted that the introduction of evidence of a crime that was not linked to the Defendant, created a false premise for the trial court's ruling regarding the propriety of the stop and search of the vehicle the Defendant was driving and the finding of the establishment of the corpus delicti. Appellant respectfully submits that the introduction was prejudicial and that absent the introduction of the evidence, a result more favorable to the Defendant would have occurred.

POINT II

THE TRIAL COURT ERRED IN RULING THAT THE STOP OF THE DEFENDANT'S VEHICLE WAS PROPER.

The decision of the Utah Supreme Court in State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) describes the three levels of encounters between police and citizens as follows:

> (1) an officer may approach a citizen at anytime and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be

> temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

Id., (quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984), cert. denied, Hartsel v. United States, 476 U.S. 1142, 106 S. Ct. 2250 (1986)).

There is no question that when a law enforcement official stops a motor vehicle, a "seizure" occurs, giving the participants therein the rights guaranteed by the Fourth Amendment. State v. Holmes, 774 P.2d 506, 507 (Utah App. 1989).

As stated by the Court in State v. Trujillo, 739 P.2d 85, 88 (Utah App. 1987), a seizure under the Fourth Amendment must be based on specific articulable facts, which, together with rational inferences drawn from them, would lead a reasonable person to conclude that the defendant had committed or was about to commit a crime.

The United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968) required that an officer be able to point to "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion. . . ."

Utah has codified the requirement of reasonable suspicion in Utah Code Annotated 77-7-15 (1990):

> A peace officer may stop any person in a public place when he has reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

See also: State v. Deitman, supra. at 617-18.

In determining the existence of "reasonable suspicion," courts are to engage in a totality of the circumstances analysis to determine whether there was a reasonable suspicion of criminal conduct. State v. Steward, 806 P.2d 213, 215 (Utah App. 1991), United States v. Sokolow, 490 U.S. 1 (1989).

The cases in which this Court has addressed the issue that seem to be most applicable to this case are those involving drug transactions. In State v. Sykes, supra., the officer stopping the defendant motorist was able to articulate the following. Neighbors had complained about persons entering and leaving the home the defendant visited at all hours; the deputy had purchased cocaine in that area himself; there was unspecified information from a confidential informant; and, the defendant entered the home and left shortly thereafter. Id. at 37. In considering those elements, the Court stated:

> None of these factors, either singly or in the aggregate, necessarily indicate wrongdoing as opposed to innocent action by defendant.
>
> At the time of the arrest, any connection between defendant and illegal activity was purely speculation. The police did not know the identity of the owner or occupant of the house, and they did not know the defendant. At that point, they had no positive evidence linking the house to illegal activity. Further, Defendant's mere presence in an area suspected to harbor drug activity does not give rise to reasonable suspicion that she engaged in such activity.

Id. at 37.

In State v. Carter, 812 P.2d 460 (Utah App. 1991), the Court found that the Defendant's general actions in deplaning from a

flight arriving from Los Angeles, similar to a drug carrier, the bulge under the Defendant's clothing at waist level and his failure to produce identification were inadequate circumstances for the officers to have formed a reasonable articulable suspicion. Id. at 466-67.

The Court held in State v. Trujillo, supra. at 89-90, that the observance of the defendant in a high crime area carrying a nylon bag in a "suspicious" manner, did not justify the Defendant's detention, in that the totality of circumstances did not constitute a reasonable suspicion despite the lateness of the hour, the high crime factor in the area and the subsequent nervous behavior of the defendant. See also, State v. Steward, Supra.; Lemon v. State, 580 So.2d 292 (Fla. App. 1991).

As applied to the facts of this case, the only factors identified by the testifying officers were that Oriental male individuals were attempting to sell quarters to various businesses in Utah County, that the coins were wrapped in legal note paper and that a burglary of coin operated machines had occurred in Price, Utah. Additionally, the officers testified that the Defendant acted nervously (R. 107-112). There is nothing illegal or improper in accumulating quarters from personal savings, gambling or regular business activities. Additionally, there is nothing improper in trying to convert those coins to paper money to accommodate payment of bills or expenses. The possession of coins, even in great number, is legal. There are many businesses that take coins (laundry, video games, food concessions and arcades), as the major

percentage of payment by customers. The proprietors of those businesses or family members may be paid in quarters or take quarters to pay expenses.

Regardless of the state's attempt to draw the conclusion of illegality from it, the accumulation and exchange of quarters is legal and is consistent with legal activity. Although the state was able to identify the car in question as the car stopping at the Skyview Cafe to exchange quarters, there is not a scintilla of evidence that connected the burglaries from 7-11 stores to the Defendants at the time the stop was made. The officers in Utah County had no idea about the specifics of any burglaries when the Defendant was stopped other than they had occurred.

The same logic used by police officers in this case could justify seizures from and detentions of our general citizenry. Every person taking an item into a pawn shop could be detained, questioned and searched because somewhere in Utah there is going to be a reported theft of that item (even though it may have occurred weeks ago). Although it's possession may not be illegal, the same rationale could be used to justify the seizure because it might be related to the theft. Garage sales, newspaper want-ads could create the same suspicion as the conduct of the Defendant in this case.

As in the cases previously decided by the Court, there are a large number of items missing from the officer's testimony in this case. First, there is no evidence linking the Defendant by name or specific description (other than he is Oriental) to any previous wrongdoing. Second, there was no evidence that the accumulation of

quarters by the defendants and his companions was equivalent to criminal behavior. The police did not have any knowledge of the Defendant prior to the stop. The Court's previous analysis of the facts of the cases cited herein mandate that the Court conclude that there was not a reasonable suspicion justifying the stop of the vehicle Defendant was driving.

POINT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BASED UPON THE DEFENDANT'S UNREASONABLE DETENTION.

It is clear that the Defendant, who had the owner's permission to drive the vehicle had the required permissive and possessory control of the car to contest a lengthy detention and warrantless automobile search. State v. Taylor, 818 P.2d 561, 565 (Utah App. 1991).

The case law in Utah relating to the scope of detention has developed over the last few years. It is clear that an officer may stop a vehicle incident to a traffic offense. State v. Lopez, 831 P.2d 1040, 1043 (Utah App. 1992); State v. Lovegren, 829 P.2d 155, 157-58 (Utah App. 1992); State v. Roth, 827 P.2d 255, 257 (Utah App. 1992); State v. Roth, 827 P.2d 255, 257 (Utah App. 1992). Further, the length and scope of a police officer's detention must be "strictly tied to and justified by 'the circumstances which rendered its initiation permissible." State v. Johnson, 805 P.2d 761, 763 (Utah 1991); State v. Hansen, 193 Utah Adv. Rep. 27, 28 (Utah App. 1992).

The specific guidelines were established in State v. Sepulveda, 198 Utah Adv. Rep. 69 (Utah App. 1992):

> Utah courts have determined "an officer conducting a routine traffic stop may request a driver's license and vehicle registration, conduct a computer check, and issue a citation." [Citing cases] The officer may also check for outstanding warrants "so long as it does not significantly extend the period of detention." [Citing cases] However, once the occupants of the vehicle have satisfied the reasons for the initial stop, the officer must permit them to proceed. [Citing case]"Any further temporary detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified under the fourth amendment only if the detaining officer has reasonable suspicion of serious criminal activity."[Citing case] (Emphasis added).

Id. at 71.

In State v. Robinson, 797 P.2d 431 (Utah App. 1990), the officer effected a vehicle stop. After receiving the driver's valid driver's license and registration, learning that the van had been borrowed to go fishing, determined that the van was not reported stolen, and issuing a citation, the officer detained the defendant based upon his observation of a homemade bed, two gym bags, and a fishing pole. Based upon the consent of the driver, the officer searched the van. In addressing the question of whether the officer's continued detention constituted a seizure in violation of the Fourth Amendment, stated that the proper inquiry was,

> Whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified it in the first place.

Id.

The Court determined that the defendant's nervousness, failure

to make eye contact, improper clothing and equipment for the weather and failure to produce evidence of permission to use the vehicle were insufficient to justify the roadside detention and questioning. Id. at 436. The Court held that the detention and request to search after the purposes of the initial stop had been accomplished was a violation of the defendant's Fourth Amendment rights. Id. at 437.

In State v. Lovegren, 829 P.2d 155 (Utah App. 1992), the Court was faced with a situation where an officer had pulled a motorist over for a traffic violation. The defendant was wearing sunglasses and the vehicle was cluttered. The officer asked and received permission to search the vehicle, ultimately producing a controlled substance. On appeal the Court held that the cluttered condition of the car and bloodshot eyes were not indicative of criminal behavior and the request to search the vehicle was improper. Id. at 158. See also, State v. Godina-Luna, 826 P.2d 652 (Utah App. 1992).

In applying the facts of this case to the prior decisions of the Utah Appellate Courts, it is necessary to determine the reason for the traffic stop. Deputy Hill testified that when an Attempt to Locate is received on a particular vehicle, the procedure is to, "stop the vehicle and obtain the information from them, contact the agency that originated the ATL, and find out information that they would like us to." (Tr. 68, Lines 13 to 18).

The Defendant was pulled over by Patrolman Shields who immediately, took the keys to the car from the ignition. The Defendant was asked to exit and vehicle and Patrolmen Shields

informed the Defendant why he had stopped him and asked him if he had large amounts of quarters. The Defendant responded that he did not. Additionally, the Defendant indicated that he had not been through Price. Aside from obtaining the Defendant's driver's license, no other efforts were taken by the patrolman to elicit any further information. (Tr. 59, Line 15 to 61, Line 4).

Deputy Hill testified that it took him fifteen minutes to arrive at the scene after the Defendant's vehicle was stopped (Tr. 73, Lines 1 to 3). It is clear that the Defendant was simply being detained at the scene awaiting the arrival of more officers. Once, the Defendant was taken away from the car, the officers commenced a warrantless search of the car without the permission of the Defendant.

There is no question that Patrolman Shields obtained the information required by the ATL including all relevant data on the Defendant and where he had been traveling. The detention of the vehicle and the Defendant thereafter was unreasonable and outside the scope of the purpose of the stop. The law enforcement officers gathered no evidence of any kind to bolster a claim of illegal behavior. There was nothing irregular about the Defendant's license, the car was not reported stolen, and the officers did not observe anything about the car upon which further detention could be justified or upon which the search could be based.

Again, all the State produced to justify the stop and the length of the detention was information that the Defendant or a person in his vehicle was trying to exchange quarters wrapped in

notebook paper for currency at various businesses in Utah County. The attempt to elevate the unrelated burglary in Price that occurred sixteen days before to some kind of exigent circumstance, justifying the detention of the Defendant is asinine. As detailed in the Statement of Facts, all that was really obtained relating to Carbon County, before the traffic stop, from the officials in Price, was there had been "thefts and burglaries and vending machines [sic] where quarters had been taken" (Tr. 37, Lines 6 to 10). The leap to the conclusion that persons in Price wanted to talk to the Defendant is **absolutely unsupported** by any testimony in the Transcript by a person that talked to Carbon County officials. Specifically, Finding of Fact number 3, to the extent it isolates the conversation with Carbon County to the burglary at the 7-11 in Price on October 10 or 11, is completely unsubstantiated by the testimony (R. 111)

All that was known is set out above and none of that information linked the defendant to any crime or illegal behavior and the record is clear that there was nothing about his driving, registration or the inside of the car that justified the detention.

POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BASED UPON THE WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE.

The Utah Supreme Court in State v. Limb, 581 P.2d 142 (Utah 1978) adopted the ruling of the United States Supreme Court in Chambers v. Maroney, 399 U.S. 42 (1970), allowing the warrantless

search of an automobile where the law enforcement officers possess probable cause for the search and there are exigent circumstances justifying the warrantless search.

As detailed in the previous point, there was no probable cause for the traffic stop or the detention of the Defendant. It follows that absent any evidence at that juncture, there can be no justification of the warrantless search.

The possession of quarters is legal. The exchange of quarters for currency is legal. The stop, detention and search of a vehicle based upon one call by a dispatcher to a Carbon County dispatcher that a number of thefts and burglaries had occurred involving quarters is not reason to stop all persons having quantities of quarters in their possession. Again, there was no information communicated from Carbon County that, at the time of the stop, even indicated the involvement of Oriental males, let alone the Defendant or the other occupants of the car; or, a citing of the vehicle he was driving in the area of a burglary; or even a time reference on when the crimes were supposedly committed. A review of the trial court's Findings indicates only one paragraph, relating to the commission of a crime and that is Paragraph 3 which is totally vague, ambiguous and devoid of any relationship to the Defendant (R. 111).

The Defendant submits that any claim to probable cause is simply not substantiated in the record and the evidence from the search should be suppressed.

POINT V

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF THE DEFENDANT'S CONFESSION BASED UPON THE ABSENCE OF INDEPENDENT EVIDENCE.

The Defendant contends that the trial court allowed evidence of his confession to be introduced before sufficient independent evidence of a crime was introduced. Utah law on the subject is established by State v. Weldon, 6 Utah 2d 372, 314 P.2d 353 (Utah 1957).

In that case the Court noted that the "rule is quite universal that an extrajudicial confession, by itself, is not sufficient to sustain a conviction of a crime, but there must be evidence, independent of the confession to establish the corpus delicti." Id at 354. The rule established in the English common law was to prevent the conviction of the innocent on the strength of false confessions. Id. at 354.

In defining a test to describe the quantum of proof necessary to establish the crime and satisfy the requirement, the Court stated:

> Although they vary, it seem quite generally agreed that the evidence of the corpus delicti need not be "beyond reasonable doubt," "conclusive" or "sufficient to warrant a conviction," independent of other evidence. From a perusal of such authorities it seem to us, that the generally accepted view, to which we give our approval, is that the evidence independent of the confession need not establish the corpus delicti by separate, full or positive proof, and that the whole evidence, including the confession, may be considered together in determining whether the corpus delicti has been satisfactorily established . . . . (Emphasis added)

Id. at 356. Justice Crockett then stated that the rule to be employed is that there must "be independent, clear and convincing evidence of the corpus delicti. . . ." Id. at 357. See also, State v. Ferry, 2 Utah 2d 371, 275 P.2d 173 (Utah 1954).

The standard set out above raises the inquiry as to whether, independent of the confession, there was independent, clear and convincing evidence of the crime. The fact is that there was no evidence of a crime to which the Defendant can be linked. As set out above, there is not one scintilla of evidence that links the Defendant to the burglary of the 7-11 Store in Price, other than he is Oriental. No one can place the Defendant at the 7-11 or in the area. The store clerk could not identify him, the car or the other occupants. No one has been able to determine the origin of the quarters as coming from a particular spot and the tools found in the car cannot be linked forensically to any crime. There is simply no evidence of a crime or that the quarters were stolen.

It is respectfully submitted that there was no independent evidence of the crime.

CONCLUSION

The testimony in this case establishes that the trial court allowed evidence of the burglary in Price to inundate every aspect of the Defendant's trial. The evidence concerning the 7-11 burglary should never have been introduced because of a total lack of foundation linking the crime or the individuals spotted therein to the Defendant or his companions. Yet the burglary that occurred sometime during a forty-eight hour period, sixteen days

before the Defendant was stopped was allowed into evidence to establish a prior bad act of the Defendant and the supposed basis for a vehicular stop, detention and search. The evidence should have been excluded and it's absence leaves a void of any evidence establishing cause to stop, search and detain the Defendant.

The trial court erred in finding that there was a reasonable suspicion for the stop, the detention and a search of the vehicle. The evidence obtained should have been suppressed.

Finally, there was no independent evidence of a crime, apart from the confession and the conviction on that basis, should be reversed.

Dated this 30 day of November, 1993.

Steven B. Killpack Esq.
Attorney for Defendant/Appellant

MAILING CERTIFICATE

I certify that four (4) copies of the Appellant's Brief were mailed to Jan Graham, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this 30 day of November, 1993.

ADDENDUM

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**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH**

STATE OF UTAH,	:	
Plaintiff,	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	:	
SON T. NGUYEN,	:	**Case No. 921400546 FS**
Defendant(s).	:	**Judge Guy R. Burningham**

This matter came before the Court, the Honorable Guy R. Burningham presiding on the 20th day of January, 1993. The Defendant was present in person and represented by Attorney Cleve Hatch. The Plaintiff was represented by Deputy Utah County Attorney, James R. Taylor. The matter was tried to the bench and the Court considered the Defendant's various Motions in Limine and to Suppress Evidence. The Court being fully advised in the premises does hereby make and enter the following:

FINDINGS OF FACT

1. On October 27, 1992, Maxine Barker, the owner/manager of a restaurant in Spanish Fork Canyon observed a small car described as a Datsun or Toyota, cream or tan in color, occupied by five Asian individuals as it pulled up to her restaurant. One of the individuals came in and offered to sell her quarters. He indicated that he had two to three hundred rolls of quarters. Mrs. Barker purchased a couple of rolls which were wrapped in yellow notebook

paper and obtained the license number of the Toyota car as it drove away. Shortly after the individuals left Mrs. Barker went to a telephone and called Utah County Dispatch and provided all of this information.

2. Utah County Dispatchers in cooperation with patrol officers determined that shortly after the incident with Mrs. Barker additional attempts to sell quarters were made at two more businesses west of the first restaurant in Spanish Fork Canyon.

3. Dispatchers contacted Price and were told that Price Police were investigating a recent burglary and theft involving large numbers of quarters from a video arcade machine.

4. Dispatchers ran a computer check on the license number provided and determined that the registered owner of the vehicle had a Vietnamese name and had a suspended driver's license.

5. Dispatchers broadcast an "ATL" (attempt to locate) to patrol officers including the Utah County Sheriff and local police departments and contacted Highway Patrol dispatch.

6. The information was dispatched to Highway Patrol officers and Department of Transportation vehicles.

7. Shortly thereafter a small Toyota with the same license plate number occupied by four Asian individuals was observed northbound on Interstate 15. Highway Patrol troopers and other law enforcement agencies responded and the vehicle was stopped just west of American Fork on Interstate 15.

8. A Utah Highway Patrol trooper approached the car and spoke with the driver who was the Defendant, Son t. Nguyen. The

Defendant denied having any quarters in the car or any knowledge of any incident in Price or Spanish Fork Canyon.

9. The Defendant was not the registered owner of the car. Although he stated that the registered owner was a friend he was unable to give a full name, address, or phone number.

10. Officers opened the trunk of the automobile and discovered a bag containing a large number of quarters, some wrapped in yellow notebook paper. Officers also found bolt cutters and tools in a separate bag in the trunk and additional rolls of quarters in the passenger compartment of the car.

11. The Defendant was advised of his miranda rights, which he waived, and conversed with Deputy Dave Hill at the scene demonstrating an ability to speak and understand the English language.

12. The quarters were taken into evidence and counted when it was determined that there was a total of $2,096.75 in quarters.

13. The Defendant was taken to American Fork Police Department where he was again advised of his miranda rights and questioned by Detective Scott Carter of the Utah County Sheriff's Office after indicating that he was willing to waive his rights and speak without an attorney.

14. The Defendant admitted to Detective Carter that he had been in Colorado with his friends and that they had burglarized several 7-11 stores. The Defendant stated that the quarters had been taken from video arcade games in the 7-11 stores. The Defendant stated that he thought there were approximately $550.00

worth of quarters.

15. The Defendant was again interviewed several days later by Detective Carter. The Defendant executed a written waiver of his miranda rights and wrote and signed a confession which was accepted into evidence.

16. The written statement of the Defendant was as follows:

> They borrow the car let drove it to Co. Spring 2 7eleven when we frist got in to C.S. then we rent a motel 2 nights and after that we hit 4 more 7eleven then we drove to denver to eat and then drove home. We took quarters from the machine. I was with Monk, long, nam, nam.

During the same interview the Defendant described to Detective Carter in detail how the burglaries would be performed. He stated that a group of individuals, all oriental, would go into the stores which were always 7-11's. They would play the video machines for a period of time until the clerk was no longer interested. They would then cut off the lock and completely remove the box for catching coins and simply walk out of the store with the stolen quarters and equipment.

16. On October 10, 1992, a 7-11 in Price was burglarized. At approximately 2:00 a.m. seven oriental individuals entered the store and began playing video games which they did for approximately forty minutes. The individuals then left and the clerk didn't notice anything wrong with the video machine. At the beginning of the next shift it was noticed that the video machine was blank and not operating. The owner checked the machine and discovered that the lock to the coin box had been cut, the door to the coin collection box pried opened and the coin box removed. The

Price City Police were called to the 7-11 and an official report was taken and an investigation started.

17. It was stipulated that the bolt cutters seized in the car the Defendant was driving was excluded as having cut the lock on the 7-11 in Price.

18. The Court finds beyond a reasonable doubt that on or about October 27, 1992, in Utah County the Defendant retained the property of another person knowing the property had been stolen or believing that it probably had been stolen with the purpose to deprive the owner of the property and the property was cash or coins with the value of more than $250.00 but less than $1,000.00.

From the foregoing Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

1. The initial stop of the automobile being driven by the Defendant was lawful being based upon reasonable suspicion that the Defendant or the occupants of the car were involved in video burglaries in the Price area or that the occupants of the car contained evidence which may have been relevant to the Price investigation.

2. The detention of the Defendant and the other passengers of the car did not exceed the scope of the initial stop.

3. The warrantless search of the automobile was based upon probable cause and exigent circumstances. More specifically, a reasonable person in viewing the evidence available to the officers could have concluded that it was likely that the automobile

contained evidence relevant to a burglary or theft of coins in the Price area. Inasmuch as the potential evidence was in an automobile traveling away from the suspected crime and the best information available indicated that the occupants were in the midst of actively disposing of potential evidence, there were exigent circumstances justifying a warrantless search.

4. Although the evidence independent of the Defendant's confession by itself does not establish the corpus delicti of the crime charged when considered together with the confession the Court believes that there is substantial separate evidence of the corpus delicti such that reasonable minds could believe that the crime was a real one which was in fact committed and not one which was fanciful or imaginary.

5. The Defendant's confession was freely and voluntarily made following an appropriate waiver of his rights to counsel as required by Miranda.

6. The Defendant is guilty of the lesser included offense of Theft By Receiving, a Third Degree felony.

DATED this _____ day of January, 1993.

BY THE COURT:

_____
GUY R. BURNINGHAM
DISTRICT JUDGE

APPROVED AS TO FORM:

_____
CLEVE HATCH
ATTORNEY FOR DEFENDANT

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Utah County Attorney
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

STATE OF UTAH,	:	
	:	O R D E R
Plaintiff,	:	
vs.	:	
SON T. NGUYEN,	:	Case No. 921400546 FS
Defendant(s).	:	Judge Guy R. Burningham

This matter came before the Court, the Honorable Guy R. Burningham presiding on the 20th day of January, 1993. The Defendant was present in person and represented by Attorney Cleve Hatch. The Plaintiff was represented by Deputy Utah County Attorney, James R. Taylor. The Court having made and entered its Findings of Fact and Conclusions of Law it is hereby ORDERED:

1. The Defendant's Motion to Suppress Evidence grounded in the stop of the car and the search is denied.

2. The Defendant's Motion to Suppress the confession of the Defendant based upon a claim that he did not waive his Fifth Amendment right to counsel is denied.

3. The Defendant's Motion to exclude the Defendant's confession pursuant to the corpus delicti rule is denied.

4. The Defendant's Motion in Limine to exclude evidence on

the grounds of relevance is denied.

5. The Court adjudges that the Defendant is guilty of retaining another person's property on or about October 27, 1992, in Utah County, knowing that the property had been stolen or believing that the property probably had been stolen with the purpose to deprive the owner where the property had a value in excess of $250.00 but less than $1,000.00 in violation of Utah Code Annotated, Section 76-6-408, a Third Degree felony.

6. The matter is referred to the Department of Adult Probation and Parole for the preparation of a presentence investigation. The Defendant is ordered to be present on the 17th day of February, 1993, at the hour of 8:00 o'clock a.m. for the purpose of sentencing. Bail shall remain as previously ordered.

DATED this _____ day of January, 1993

BY THE COURT:

_____
GUY R. BURNINGHAM
DISTRICT JUDGE

APPROVED AS TO FORM:

_____
CLEVE HATCH
ATTORNEY FOR DEFENDANT